U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: October 14, 1999

CASE NO.: 1996-INA-0468

In the Matter of:

SNOW FLAKE DONUTS
Employer

On Behalf of:

SOVANN KONG
Alien

Appearance: Gordon Quan, Esq.
For the Employer

Certifying Officer: Charlene G. Giles, Region VI

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On February 7, 1995, Snow Flake Donuts ("Employer") filed an application for labor certification to enable Sovann Kong ("Alien") to fill the position of "Baker" (AF 76-77). The job duties for the position are:

> Mixes and bakes ingredients to recipes to produce various pastries such as croissants, kolaches, and assorted donuts and related products.

The requirements for the position are two years of experience in the job offered or two years experience in the related occupation of "Pastry Maker." Other Special Requirements are a work schedule of 2:00 a.m. to 10:00 a.m. Monday through Friday.

The CO issued a Notice of Findings on February 26, 1996 (AF 47-50), proposing to deny certification on the grounds that the Employer has advertised the position with an unduly restrictive requirement of two years experience for a Baker in strictly a donut shop, has not shown that the requirement is a business necessity, has not shown that the requirement is normally required for the job in the United States, has not shown the job was offered at the actual minimum requirements, and has not shown that the job is clearly open to any qualified U.S. worker. Accordingly the CO found the Employer was in violation of 20 C.F.R. §§ 656.21(b)(2), (b)(2)(i), (b)(2)(i)(A), (b)(2)(i)(iv), (b)(5), and 656.20(c)(8). Moreover the CO found the Employer had also hired one Baker on staff, and did not require two bakers in a donut shop. The CO required the Employer to documents the need for a baker by submitting a menu of available pastry items other than donuts available for purchase at the store, recipes for croissants, kolaches and other related products, inventory and sales records to document the amount of pastry items that have been purchased by customers in the past year. Accordingly, the Employer was notified that it had until April 1, 1996, to rebut the findings or to cure the defects noted.

In its rebuttal, dated April 1, 1996 (AF 20-27), the Employer contended that "a baker is a normal position for a bakery shop," whether the shop requires two bakers is the jurisdiction of the INS, that half of its menu is bakery items such as "ham and cheese croissants, kolaches, pigs in the blanket, fruit sticks and muffins as well as eclairs, apple fritters rolls and twists." The Employer included invoices of croissants, yeast, sausage, cheese and donut mix.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued the Final Determination on June 20, 1996 (AF 17-19), denying certification because the Employer has failed to comply with Federal regulations at 20 C.F.R. § 656. The CO determined that the information supplied by the Employer failed to support the need for a full-time Baker with two years experience, that the Employer failed to supply the requested recipes so that he CO could determine which items required baking, and failed to provide the requested inventory and sales receipts.

On June 29, 1996, the Employer requested review of the Denial of Labor Certification (AF 2-3). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer submitted a Brief on December 23, 1996.

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd..*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* ("DOT"), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at 656.21(b)(2) requires that the employer establish the business necessity of the requirement.

At the outset, we note that it is well settled that evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *The Fifteenth Street Garage*, 90-INA-52 (Nov. 21, 1990); *Physician's Inc.*, 87-INA-716 (July 12, 1988). Therefore, the new evidence submitted with Employer's appeal will not be considered.

In this case the issue is whether the requirement of a Baker with two years of experience is excessive in light of the Employers business of a donut shop. We agree with the CO that it is.

Despite the employer's contentions in rebuttal that it is a "bakery shop," it has offered no documentary evidence from which to conclude it is a bakery. First, the Employer has failed to provide the documentation requested by CO, in the form of recipes so the CO could determine if any items were actually baked, and invoices and sales receipts so the CO could determine what portion of the Employers business was from baked goods. Failure to provide documentation reasonably requested by the CO is grounds for denial of labor certification. *The Dwight School*, 93-INA-58 (Apr. 13, 1995); *The Foot Works*, 93-INA-464 (Nov.30, 1994); *John Hancock Financial Services*, 91-INA-131 (June 4, 1992). Next, the only evidence the Employer did provide were invoices showing purchases of croissants, link sausage, yeast and donut mix, and the Employer's unsupported conclusions that "Snow Flake Donuts" was "bakery shop". Unsupported conclusions are insufficient to demonstrate that job requirements are normal for a position or are supported by business necessity. *Tri-P' Corp.*, 88-INA-686 (Feb. 17, 1989)(*en*

banc); *Dunkin Donuts*, 95-INA-192 (Jan. 22, 1997)(position of Baker with two years experience found to be unduly restrictive based on donut shop employer's failure to document business necessity). Finally, even if the Employer had established it is a "bakery shop" producing items requiring the services of a Baker with two years experience, it has additionally failed to document that its business is expanding to the point where a bona fide job opportunity exists.

The burden of proof for establishing labor certification is on the Employer. 20 C.F.R. 656.2(b). We find that the Employer has failed to establish that the requirement of a baker with two years experience is not unduly restrictive, or a business necessity, for the business of a donut shop. The CO's denial of labor certification was, therefore, proper.

Order

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.